

EX PARTE OR LATE FILED

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

FEB 25 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:

Implementation of Section
309(j) for Competitive
Bidding

MM Docket No. 97-234/

Reexamination of the Policy
Statement on Comparative
Broadcast Hearings

GC Docket No. 92-52

Proposals to Reform the
Comparative Hearing Process

GEN Docket No. 90-264

To: The Commission

MOTION TO RECUSE FCC COMMISSIONERS

Respectfully submitted,

Stephen T. Yelverton, Esq.
1225 New York Ave., N.W.,
Suite 1250
Washington, D.C. 20005
Telephone: (202) 276-2351

February 25, 1998

No. of Copies rec'd
List ABCDE

079

TABLE OF CONTENTS

	<u>Page(s)</u>
Summary	ii
Motion to Recuse	1
Statement of the Facts	2
(1) Background of the Proceeding	2
(2) Orion's Construction and Operation After the <u>Bechtel</u> Decision	4
(3) Political Intervention of U.S. Senators Jesse Helms and Lauch Faircloth on Behalf of Orion	7
Arguments	16
(1) Recusal of Chairman Kennard Because of Congressional Interference	17
(2) Recusal of Chairman Kennard Because of a Prospective Violation of 18 U.S.C. 201	22
(3) Recusal of Chairman Kennard to Prevent the Appearance of Impropriety	24
(4) Recusal of Commissioners Powell, Tristani, and Furchgott-Roth	25
(5) Recusal of Commissioner Ness Because of her Comments as to the Merits of Orion's Application	27
Conclusions	29
Declaration of Willsyr's General Partner	
Exhibits	
Certificate of Service	

SUMMARY

Willsyr is an applicant before the FCC for a construction permit for a new FM broadcast station in Biltmore Forest, North Carolina. It filed comments and reply comments in Notice of Proposed Rulemaking ("NPR"), in MM Docket No. 97-234. The NPR is considering the adoption of rules which would govern the selection of the permanent licensee in the Biltmore Forest proceeding.

Willsyr requests that Chairman William Kennard recuse himself from participation in the NPR with respect to the adoption of rules which would govern the selection of the permanent licensee in the Biltmore Forest proceeding. This request for recusal is based upon information obtained from the Congressional Record, October 29, 1997, pp. S11308-11310, and related materials, including numerous press reports, which indicate that U.S. Senator Jesse Helms (R-NC) placed a hold on the nomination of Mr. Kennard to be Chairman of the FCC for the express purpose of obtaining an agreement from him to take official action at the FCC to assist and to facilitate the grant of the application of Orion Communications Limited for construction permit for the Biltmore Forest station. The official action by Chairman Kennard, which was demanded by Senator Helms to release the hold on his nomination, included placing in the NPR a request for comments as to whether the FCC should decide the Biltmore Forest proceeding on the basis of a frozen 10-year old record and comparative hearings, instead of auctions.

It appears that Senator Helms, as consideration for the release of the hold on the nomination, further expects Mr. Kennard to act in his official capacity as Chairman to adopt rules in the

NPR to give preferential treatment to the application of Orion that would result in its grant of the Biltmore Forest permit.

In order to prevent political interference, or the appearance of any impropriety, in adopting rules in the NPR, which would ultimately resolve the Biltmore Forest proceeding, Chairman Kennard should recuse himself from the NPR. He has already recused himself from the Biltmore Forest proceeding because of Senator Helms.

Such recusal by Mr. Kennard would also prevent a violation of 18 U.S.C. 201 which prohibits a public official, or person selected to be a public official, from receiving anything of value in which he is not legally entitled, in return for giving preferential treatment in the performance of his official duties.

In view of the intense political pressure that Senator Helms applied to Mr. Kennard in order to obtain preferential treatment for Orion by the FCC and to obtain its grant, Willsyr moreover requests that Commissioners Powell, Tristani, and Furchtgott-Roth disclose whether they received any solicitations from Senator Helms, or any one else, or ex parte contacts with respect to the grant of the application of Orion, or requests to give it preferential treatment with respect to the NPR.

In MediaWeek, January 5, 1998, p. 19, Commissioner Ness is quoted as "concerned that auctions, while quick and efficient, ignore the equities that already exist in some of the outstanding radio license cases, including Lee's [Orion]. Accordingly, Commissioner Ness should disclose all the ex parte contacts and political solicitations that she has received with respect to the application of Orion.

MOTION TO RECUSE FCC COMMISSIONERS

Willstyr Communications, Limited Partnership ("Willstyr"), by counsel, pursuant to 5 U.S.C. 553 (c), 556 (b), and 557 (d)(1), hereby submits this motion to recuse. It requests the recusal of Commissioners of the Federal Communications Commission ("FCC") from participation in the Notice of Proposed Rulemaking ("NPR"), in MM Docket No. 97-234, GC Docket No. 92-52, and GEN Docket No. 90-264, rel. November 26, 1997, with respect to the adoption of rules which would affect the pending application of Orion Communications Limited ("Orion") for construction permit for an FM station in Biltmore Forest, North Carolina.

This rulemaking proceeding is "on the record," which thereby invokes the provisions of 5 U.S.C. 556 and 557. See, Mobil Oil Corp. v. FPC, 483 F.2d 1238, 1250-1251, n. 39 (D.C. Cir. 1973). Moreover, in a rulemaking where an effort is to be made to single out a particular entity or party for special consideration based upon its own peculiar circumstances, the strict provisions of 5 U.S.C. 556 and 557 must apply. See, U.S. v. Florida East Coast Railway Co., 410 U.S. 224, 245-246 (1972).

Recusal, under 5 U.S.C. 556 and 557, is required because of the political interference and intervention of U.S. Senators Jesse Helms and Lauch Faircloth on behalf of the application of Orion, and the Senators' demand (and their coercion) that the FCC adopt rules pursuant to the NPR which would result in Orion's application being granted in view of purported "equities" in its favor. See, Congressional Record, May 8, 1997, p. S4249; and October 29, 1997, pp. S11308-11310.

In the NPR, the FCC generally requested comments as to: (a) implementation of Section 309 as to competitive bidding for commercial broadcast licenses; (b) reexamination of the policy statement on comparative hearings; and (c) proposals to reform the comparative hearing process to expedite resolution of cases.

The NPR, at paras. 13-22, as a result of the coercion of Senator Helms, specifically requested comments as to whether comparative hearings, instead of auctions should be used in a subset of about 20 proceedings, which includes the Biltmore Forest proceeding, where a decision under the "integration" comparative criteria was rendered by the FCC, prior to the Bechtel decision invalidating that criteria. Senator Helms demands the use of a frozen 10-year old record and comparative hearings, despite the Bechtel decision, because he believes that it would benefit Orion and lead to its grant of a permanent license for the Biltmore Forest FM frequency.

Statement of the Facts

(1) Background of the Proceeding

Willsyr is one of five competing applicants in a pending proceeding (MM Docket No. 88-577) for a construction permit for a new FM broadcast station in Biltmore Forest. Willsyr filed its application in 1987 and went through a lengthy and contentious multi-party comparative hearing in 1989.

Although found basically qualified by the Administrative Law Judge ("ALJ"), the Review Board, and by the FCC, Willsyr was not ranked as the superior applicant under the "integration" comparative criteria. Orion was the only applicant awarded 100%

integration credit. National Communications Industries, 5 FCC Rcd 2862 (ALJ 1990); 6 FCC Rcd 1978 (Rev. Bd. 1991); 7 FCC Rcd 1703 (1992); Liberty Productions, 7 FCC Rcd 7581 (1992); 8 FCC Rcd 4264 (1993). The decisions of the FCC were appealed to the U.S. Court of Appeals for the D.C. Circuit. See, Case No. 92-1645 and Consolidated Case Nos. 93-1465, 93-1466, and 93-1470.

The FCC initially granted a conditional construction permit to Orion in 7 FCC Rcd 1703. This was on February 28, 1992, and was before any petitions for reconsideration had been filed with the FCC. It was less than one month after the D.C. Circuit first questioned the "integration" criteria and first started remanding such comparative cases to the FCC for reconsideration. See, Bechtel v. FCC, 957 F.2d 873, which was issued on January 31, 1992.

A primary issue on appeal to the D.C. Circuit was whether the FCC had misapplied its "integration" criteria to favor Orion, a non-minority applicant that was a local broadcaster. The award of 100% quantitative integration to Orion was improperly based upon credit for Betty Lee as a proposed manager/owner of the FM station.

During the over 40 years that Betty Lee's husband, Zeb Lee, who is a co-owner of Orion, had owned and operated an AM broadcast station (WSKY) in Asheville, she had no appreciable management or ownership role. The appealing applicants contended that Betty Lee's "integration" proposal in the Biltmore Forest application was a "sham" which was designed to garner Orion a then applicable gender preference for "female" management and ownership.

Another primary issue on appeal was whether Orion had the required financial qualifications and whether it had made

misrepresentations or lacked candor in this respect. Orion failed to disclose to the FCC the fact that the IRS had imposed substantial tax liens against its principals and their AM station.

After the briefs were filed, the D.C. Circuit rendered its decision in Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1993), which found the "integration" criteria to be inherently arbitrary and capricious and peculiarly without foundation. The D.C. Circuit further held that the remedy for applicants, such as Willsyr, whose applications had been denied because of the "integration" criteria is entitlement to a new proceeding in which the FCC considers its application under standards free of such an irrational criteria.

As a result of Bechtel, the D.C. Circuit sua sponte reversed on March 15, 1994, the FCC's decisions in the Biltmore Forest proceeding and remanded all five competing applicants for further consideration under a new selection criteria. This reversal and remand included two applicants that had been disqualified by the FCC. Orion did not seek rehearing of the order to reverse the conditional grant of its application for construction permit and to remand its application, and those of the competing applicants, to the FCC for reconsideration under a new selection criteria.

(2) Orion's Construction and Operation After the Bechtel Decision

The competing applicants filed with the FCC on May 2, 1994, a motion to formally rescind the conditional construction permit of Orion whose grant had been reversed by the D.C. Circuit on March 15, 1994. Orion thereafter first commenced construction on the Biltmore Forest FM frequency on May 27, 1994, and first commenced operations on July 29, 1994. Orion failed to file an application

with the FCC for interim authorization to construct and to operate.

Orion made the decision to construct and operate after its conditional grant had been reversed because its principals were forced to sell their AM broadcast station to pay IRS tax liens and other debts and outstanding judgments. These IRS tax liens, debts and judgments against Orion's principals were unrelated to the Biltmore Forest FM proceeding, other than the legal fees and expenses that Orion had incurred in prosecuting its FCC application. See, "Petition for Reconsideration," filed January 16, 1996, pp. 4-8, 13-15, n. 4.

After selling their AM broadcast station, Orion's principals were still burdened with substantial debt and they had no jobs or means to earn an income. Their only unencumbered "asset" was the pending (and now ungranted) Orion application for the Biltmore Forest FM frequency. See, "Motion for Stay," filed November 6, 1996, p. 3, and Declaration of Zeb Lee, pp. 3-4, paras. 8-9.

Orion's principals borrowed some \$500,000, to pay their existing debts and to construct the Biltmore Forest FM station. The cash flow from the station was to be used to repay the loan and to pay salaries to Orion's principals, who had no other jobs. Such reliance on the Biltmore Forest FM station to borrow the necessary funds to construct and to operate would show that Orion is and was not financially qualified under FCC standards.

The Biltmore Forest FM station was used as the collateral for the loan, although at best Orion had a conditional permit from the FCC. However, a bank loan collateralized only by a broadcast station which had a conditional permit would appear to violate

prudent banking practices and Federal bank lending regulations.

The FCC issued a policy statement in Modification of Comparative Proceeding Freeze Policy, FCC 94-204, p. 3, rel. August 4, 1994, 9 FCC Rcd 6689. The FCC stated that permittees, who had commenced construction could continue construction only at their own risk and should not incur additional obligations directed toward construction and operation. It further stated that permittees whose program test authority had commenced pursuant to orders or decisions which were "non-final," could continue operating in order not to deprive the public of existing service.

In Highlands Broadcasting, Inc., 9 FCC Rcd 5746 (1994), the FCC held that an applicant with a "non-final grant" that had constructed and operated pursuant to program test authority at the time of Bechtel could continue operating. Highlands, at para. 10, expressly distinguished its ruling from the situation of Orion, who had constructed and operated after a Bechtel remand.

The competing applicants filed petitions for writ of mandamus with the D.C. Circuit. They requested that the FCC be directed to act forthwith on their motion to formally rescind the conditional (and now reversed) construction permit of Orion and order it to cease its unauthorized and "for-profit" operation in favor of a lawful joint interim operator, pursuant to 47 C.F.R. 73.3592 (b) and to established precedent of the D.C. Circuit in Consolidated Nine, Inc. v. FCC, 403 F.2d 585 (D.C. Cir. 1968).

The staff of the Mass Media Bureau, on October 12, 1994, denied the May 2, 1994, motion to rescind the conditional construction permit of Orion. However, on review, the FCC reversed

in Orion Communications Limited, FCC 95-456, rel. November 29, 1995. The FCC required Orion to cease its unauthorized and "for-profit" operations in favor of a joint interim operator. All of the competing applicants were allowed to equally participate in a non-profit interim operation, pursuant to 47 C.F.R. 73.3592 (b).

Orion refused to join in the interim application with the competing applicants, or to file its own interim application. It instead filed a petition for reconsideration with the FCC.

(3) The Political Intervention of U.S. Senators Jesse Helms and Lauch Faircloth on Behalf of Orion

After Orion filed its petition for reconsideration, Senators Helms and Faircloth made ex parte presentations to the FCC on its behalf. They demanded that Orion be allowed to continue operating, to the detriment of the competing applicants.

Four of the competing applicants organized a non-profit corporation under the name of Biltmore Forest Radio, Inc. ("BFR") and filed a joint interim application with the FCC. It is a multi-cultural and multi-racial group. The application was placed on public notice on December 4, 1995. Orion failed to file a petition to deny or opposition to grant of the joint interim application.

In Orion Communications Limited, FCC 96-402, rel. October 22, 1996, the FCC reaffirmed the grant of the joint interim application and its decision that Orion must cease its unauthorized and "for-profit" operations in favor of a joint interim operation. On the day that the FCC's decision was released, Senators Helms and Faircloth sent an ex parte letter to the FCC demanding that Orion not be required to cease operations and that it be solely awarded

the grant of the permanent license for Biltmore Forest.

Orion filed a notice of appeal (Case No. 96-1430) with the D.C. Circuit and requested a stay of the FCC's decision. In its motion for stay, Orion alleged "irreparable" harm if it was required to cease its operations in favor of the joint interim operator. The motion for stay was denied on February 27, 1997.

Senators Helms and Faircloth, and Congressman Charles Taylor (R-NC), who represents Biltmore Forest, intensified their ex parte campaign to influence the FCC to favor Orion. Senator Faircloth made a speech to the U.S. Senate addressing the merits of Orion's application and criticizing the FCC for not awarding it a permanent grant. He also attempted to introduce legislation to require the FCC to allow Orion to solely operate on the Biltmore Forest FM frequency. See, Congressional Record, May 8, 1997, p. S4249.

The FCC directed Orion to cease operations on June 2, 1997, in favor of the joint interim operator. With the support of Senators Helms and Faircloth, Orion defied the order of the FCC and continued operating for most of the day of June 2. It ceased operations later that day, but only under threat of sanctions.

Orion commenced a national public relations offensive which touted its support from Senators Helms and Faircloth. This included a feature front page article in the Wall Street Journal on June 18, 1997, that suggested the FCC had engaged in political favoritism and corruption in favor of "liberal Democrats."

Orion also commenced a national direct mail fund raising campaign. The fund raising campaign was directed to political donors of Senator Helms and Faircloth, and to other conservative

Republicans. It made emotional and overtly partisan and racial appeals for funding to finance Orion's FCC litigation.

In its fund raising appeal, Orion claimed that it was the victim of "liberal Democratic" and "Clinton" appointees at the FCC who were trying to destroy it because its owners were not "minorities" and were not "politically correct" (i.e., were white males). Orion attacked the competing applicants and the joint interim operator because one of the competing applicants includes Mel Watt, who is a "liberal Democratic" Congressman from North Carolina. See, attached mass mailing letter on behalf of Orion.

In October 1997, Senator Helms placed a hold on the nomination of William Kennard to be Chairman of the FCC. According to Senator Helms, Mr. Kennard was part of a "liberal Democratic" and African-American conspiracy at the FCC to take Orion off-the-air. Senator Helms would release the hold only if Mr. Kennard agreed to immediately put Orion back on-the-air and award it the FM license for Biltmore Forest through a comparative criteria which would not include an auction. See, attached press reports.

In questions from Senator Helms to Mr. Kennard, Senator Helms attacked Mr. Kennard for his lack of "objectivity and judgment" as General Counsel in handling the Orion application and the Biltmore Forest proceeding. In response, Mr. Kennard indicated that he would recuse himself from the proceeding. See, attached responses of Mr. Kennard to Senator Helms, dated October 6, 1997.

Senator Helms charged that Mr. Kennard, as FCC General Counsel, had been influenced by "liberal Democratic" Congressman Mel Watt to force Orion off-the-air. He is an African-American and

is an 8% non-voting stockholder in Skyland Broadcasting Company, which is one of the competing applicants in the Biltmore Forest proceeding and a member of the joint interim operation.

Senator Helms also charged that Mr. Kennard had conspired with Harvey Gantt to force Orion off-the-air. Mr. Gantt is an African-American who ran against Senator Helms as the Democratic nominee in 1990 and 1996 and is a political ally of Mr. Watt. See, attached responses of Mr. Kennard to Senator Helms, dated October 6, 1997.

The staff of Senator Helms investigated the charges of a "liberal Democratic" and African-American conspiracy at the FCC against Orion. This included sworn testimony from Mr. Kennard, who claimed that he did not know Mr. Watt or Mr. Gantt. See, attached responses of Mr. Kennard to Senator Helms, dated October 6, 1997.

Senator Helms presented no evidence to support his allegations against Mr. Kennard. After a private meeting between the two in the Senator's office, Senator Helms withdrew his hold on Mr. Kennard's nomination for Chairman and announced his support. See, attached press reports and Congressional Record, October 29, 1997, pp. 11308-11310.

According to Senator Helms, Mr. Kennard has given his "voluntary assurance that he will work with us" on the Orion case. In a Senate speech the same day, Senator Helms strongly criticized the FCC for the manner in which it has handled Orion's application and he anointed Orion as the rightful licensee for the Biltmore Forest FM frequency. See, Congressional Record, p. S11309.

Senator Helms stated that the FCC had "curiously disqualified" Orion as an applicant for the Biltmore Forest FM frequency; that

other competing applicants were basing their applications "purely on provisions favoring minorities and women"; that Orion was the most qualified applicant because its principals had successfully operated an AM broadcast station in Asheville and had pledged to be day-to-day managers of the Biltmore Forest FM station; that applicants proposing such day-to-day management should be favored over passive investor applicants; that the FCC had "amazingly forced Orion off-the-air"; that he and Mr. Kennard want to rectify this "awkward and unjustifiable" situation; and that the U.S. Court of Appeals for the D.C. Circuit "will shortly issue a decision in the near future" about "the manner in which the FCC handled Orion's application." See, Congressional Record, pp. S11308-11309.

Senator Helms criticized the Bechtel decision as unfair to Orion because it had prevailed under the "integration" criteria which that decision had later struck down. Although Senator Helms generally favors the use of auctions to award broadcast licenses, he does not want the Biltmore Forest FM frequency, or any other of the 25-30 cases "already in the FCC pipeline," to be awarded by auction. See, Congressional Record, p. S11309.

Senator Helms stated that Mr. Kennard "clearly feels that the FCC can conduct hearings on this small group and class of applicants using new comparative criteria." Moreover, Senator Helms stated that he "had been given assurances satisfactory to him by Mr. Kennard that he will, within statute and regulation, work in good faith with him and others to resolve the problems that the Bechtel decision caused. See, Congressional Record, p. S11309.

Mr. Kennard stated in response to questions from Senator Helms

that the Bechtel decision has caused "unfairness to many applicants" and that he is "quite sympathetic to their predicament." He believes that the FCC should consider arguments that "particular classes of pending applicants should be treated differently." See, Responses of Mr. Kennard to Senator Helms, October 6, 1997, pp. 1-2. According to questions submitted by Senator Helms to Mr. Kennard, Senator Helms wants the FCC to decide cases, such as the Biltmore Forest FM proceeding, under the existing hearing record, pursuant to such "special rules" as the FCC might adopt. See, Congressional Record, p. S11309.

In a October 21, 1997, letter from Senator Helms to Senator John McCain (R-AZ), Senator Helms referred to numerous discussions their staffs had about the "FCC's treatment of Orion" and that Orion and about 25-30 other applicants "were left stranded in the regulatory process by the Bechtel decision."

Senator Helms stated in the October 21, 1997, letter that the FCC "interprets [the Balanced Budget Act] as giving it the authority to decide whether these 25-30 applicants be judged on the basis of the comparative hearing process." Senator Helms believes that the comparative hearing process should be used for these applicants. In the event that the courts question this interpretation, Senator Helms wants to "swiftly move legislation through the Senate to overturn any such court ruling." See, Congressional Record, pp. S11309-11310.

In a letter of October 23, 1997, from Senator McCain to Senator Helms, Senator McCain affirmed Senator Helms' interpretation that the Balanced Budget Act allows the FCC to use

comparative hearings in proceedings such as Biltmore Forest. According to Senator McCain, in the "unlikely event that any future court decision misconstrues the [Balanced Budget Act], he will do whatever is necessary to secure the passage of legislation that will restate the terms of the statute as reflected in his letter." See, Congressional Record, p. S11310.

The Asheville Citizens-Times, in an editorial, praised Senator Helms' "strong-arm tactics" in blocking the nomination of Mr. Kennard to be Chairman. It opined that Mr. Kennard should get the Chairmanship only if he agreed to help Orion obtain the license for the Biltmore Forest FM frequency. The editorial noted that in the event that the FCC puts the frequency up for auction pursuant to the Balanced Budget Act, Senator Faircloth would "push for a legislative solution to the frequency if needed." See, attached.

The Winston-Salem Journal, in an editorial, accused Senator Helms of "extortion" and lamented that he got from Mr. Kennard what he wanted --- the Biltmore Forest FM license for Orion worth some \$6 Million in exchange for the FCC Chairmanship. See, attached.

The Wall Street Journal noted in an article on July 28, 1997, that because of Senator Helms' threatened hold on Mr. Kennard's nomination to be Chairman in view of his disapproval of the FCC's role in forcing Orion off-the-air, the White House would "push him as a package" with the other Commissioner nominees, Gloria Tristani, Michael Powell, and Harold Furchtgott-Roth.

The joint interim operator filed an ethics complaint with the U.S. Senate against Senator Helms. It charged that Senator Helms violated Senate Ethics Rules and Federal law, in 5 U.S.C. 557 (d)

and 47 U.S.C. 502, through his abuse of the powers and privileges as a U.S. Senator and through other improper actions in influencing the FCC in a restricted adjudicative proceeding to favor Orion over the joint interim operator and the competing applicants.

The ethics complaint specifically centered on Senator Helms' improper hold on the nomination of Mr. Kennard and the release of the hold in exchange for favorable action by Mr. Kennard and the FCC on the Orion application for the Biltmore Forest FM frequency, to the detriment of the joint interim operator and the competing applicants. The Biltmore Forest FM frequency has a monetary value of some \$6 Million Dollars. The Chairmanship of the FCC has monetary value based upon a salary funded by the taxpayers.

In a November 20, 1997, reply to the ethics complaint, Senator Helms acknowledged that he and Senator Faircloth expressed their judgment in an October 22, 1996, letter to the FCC that its "decision to revoke [Orion's] license ... was unjustifiable and ought to be reconsidered." Senator Helms stated that "the current Chairman [Mr. Kennard] apparently agreed ..."

Senator Helms further stated that "after [Mr. Kennard's] recusal from the [Orion] matter, and before his confirmation, I met with him to discuss, among other things, the difficulties of implementing the Bechtel decision" and that he "appreciated Mr. Kennard's candor ... and assurances that he will ... work in good faith with me and others to resolve the problems associated with the Bechtel decision."

Although Senator Helms stated that his "support" for Mr. Kennard's "nomination did not depend on the outcome of any specific

adjudication," he omitted to state whether the release of the hold on Mr. Kennard's nomination depended on the outcome of any specific adjudication, or on the outcome of any rulemaking related to any adjudication. See, attached.

On November 26, 1997, the FCC issued its rulemaking to implement the auctions authorized in the Balanced Budget Act, which was adopted July 1, 1997. Although the legislative history requires the FCC to use auctions in all pending unresolved proceedings and the legislation refers only to auctions as the authorized method of selection, the FCC nevertheless solicited comments, at para. 22, as to use of comparative hearings in a certain sub-set of approximately 20 applications which previously went through a comparative hearing and a preliminary decision thereto was rendered prior to the Bechtel decision.

This solicitation of comments by the FCC as to use of comparative hearings was part of the agreement between Senator Helms and Mr. Kennard to release the hold on his nomination.

Commissioner Susan Ness, the only incumbent on the Commission, is quoted in MediaWeek, January 5, 1998, p. 19, as "concerned that auctions, while quick and efficient, ignore the equities that already exist in some of the outstanding radio license cases, including Lee's [Orion]." The quote from Commissioner Ness is in an article specifically addressing the merits of the Orion application and the FCC's handling of its application.

On December 19, 1997, the D.C. Circuit issued its decision as to Orion's appeal of the FCC's order to take it off-the-air on June 2, 1997. The decision reversed the FCC and ordered it "to

reinstate Orion forthwith as the interim licensee."

The only changes in the facts and circumstances between February 27, 1997, when the D.C. Circuit denied Orion's motion for stay of the FCC's order for it to cease its unauthorized interim operations, and December 19, 1997, are the public pronouncements and actions by Senator Helms and Faircloth demanding that Orion be put back on-the-air and awarded the FM license for Biltmore Forest.

The FCC stated that it would not appeal the December 19, 1997, decision, even though that decision harshly criticized it for taking Orion off-the-air on June 2, 1997, and even though the decision determined that the FCC acted arbitrarily and without color of law. The court then immediately issued the mandate to prevent the joint interim operator from taking its own appeal and to immediately force it off-the-air in favor of Orion.

Orion is back on-the-air on the Biltmore Forest FM frequency. It has authority to operate until a permanent grant of the license is made. See, Order, FCC 98-4, rel. January 16, 1998. Orion stated in filings with the D.C. Circuit that the FCC should now take as much time as possible to decide the NPR comparative hearing/auction rulemaking.

ARGUMENTS

A Federal administrative agency action is invalid if based in whole, or in part, on Congressional pressures. Congressional interference so tainting the administrative process violates the right of a party to due process. The appearance of bias or pressure may be no less objectionable than the reality. ATX, Inc. v. U.S. Dept. of Transp., 41 F.3d 1522, 1527 (D.C. Cir. 1994); D.C.

Fed. of Civic Assoc. v. Volpe, 459 F.2d 1231, 1246 (D.C. Cir. 1972). The right of parties to the appearance of impartiality cannot be maintained unless decision makers are free from powerful external political influences. Pillsbury Co. v. FTC, 354 F.2d 952, 964 (5th Cir. 1966).

An agency rulemaking which resolves "conflicting private claims to a valuable privilege," such as which competing party is entitled to grant of a frequency, is a proceeding which must not be subject to external political influences. Home Box Office, Inc. v. FCC, 567 F.2d 9, 55 (D.C. Cir. 1977), citing Sangamon Valley Television Corp. v. U.S., 269 F.2d 221, 224 (D.C. Cir. 1959).

Regardless of whether an agency proceeding is classified as a judicial or legislative function, or a combination of the two, the necessity for an impartial decision is obvious. Congressional interference which occurs in the decisional process of an agency endangers and undermines the integrity of the ensuing decision, which is required to be made by an impartial agency. American Public Gas Ass'n v. FPC, 567 F.2d 1016, 1069 (D.C. Cir. 1977).

(1) Recusal of Chairman Kennard Because of Congressional Interference

Senator Helms' improper political interference and influence on behalf of Orion is demonstrated by the fact that Chairman William Kennard is recusing himself from the Biltmore Forest adjudicative proceeding because of the Senator's pressure on him as to the merits or "equities" of Orion's application. Pillsbury Co. v. FTC, 354 F.2d at 964, a member of Congress subjecting a Federal agency nominee to a searching examination as to how and why he

reached his decision in a case still pending before him, and to criticize him for reaching the wrong decision, sacrifices the appearance of impartiality and thus taints the proceeding. See, Responses of Mr. Kennard to Senator Helms, October 6, 1997, and Congressional Record, October 29, 1997, pp. S11308-11310.

Chairman Kennard must also recuse himself from participation in the NPR with respect to any rules which would affect the application of Orion and the outcome of the Biltmore Forest adjudication. If Chairman Kennard has recused himself from participation in the Biltmore Forest adjudicative proceeding because of Senator Helms' pressure on him as to the merits and "equities" of the Orion application, then he would be equally subject to recusal from a related rulemaking proceeding to adopt rules that, based upon consideration of the special circumstances and "equities" of the applicants, would govern which applicant ultimately prevails in the Biltmore Forest adjudication. Sangamon Valley Television Corp. v. U.S., 269 F.2d at 224, an ex parte approach to members of the FCC, with respect to a rulemaking, which involves resolution of "conflicting private claims to a valuable privilege," vitiates the action of the FCC and requires that the proceeding be reopened. American Public Gas v. FPC, 567 F.2d at 1069, Congressional interference is not allowed in a rulemaking.

The FCC is considering in the NPR the use of frozen 10-year old hearing records and comparative hearings for the Biltmore Forest adjudicative proceeding, instead of auctions, solely because Senator Helms coerced Mr. Kennard into agreeing to it as a condition for releasing the hold on his nomination to be Chairman

of the FCC. Senator Helms demands the use of frozen 10-year old hearing records and comparative hearings in the Biltmore Forest proceeding because of purported "equities" in Orion's favor and because he believes that adoption of hearing rules would lead to its grant of a permanent license. See, attached press reports and Congressional Record, October 29, 1997, pp. S11308-11310.

The legal standard for disqualifying a Commissioner in an agency rulemaking proceeding is a "clear and convincing showing that the agency member has an unalterably closed mind on matters critical to the disposition of the proceeding." Ass'n of Nat. Advertisers, Inc. v. FTC, 627 F.2d 1151, 1170 (D.C. Cir. 1979). This showing focuses on the agency member's prejudgment of the issues. C&W Fish Co. v. Fox, 931 F.2d 1556, 1564 (D.C. Cir. 1991).

Such a "closed mind" on the part of Chairman Kennard, or rather the coerced "closing of Chairman Kennard's mind" by Senator Helms, is demonstrated by his own statements and those of Senator Helms. According to Senator Helms, after Mr. Kennard's recusal from the Biltmore Forest adjudicative proceeding, and before his confirmation as Chairman, they privately met in the Senator's office to discuss the "difficulties of implementing the Bechtel decision" [which had reversed Orion's grant] and he "appreciated Mr. Kennard's candor ... and assurances that he will ... work in good faith with me to resolve the problems [reversal of Orion's grant] associated with the Bechtel decision." Senator Helms stated that "the FCC's decision to revoke Orion's license" was "unjustifiable" and that Mr. Kennard "apparently agreed." See, Senator Helms' November 20, 1997, reply to Senate Ethics complaint.

Prior to the confirmation of Mr. Kennard as Chairman, Senator Helms criticized the Bechtel decision as unfair to Orion [because it reversed its grant] and criticized the FCC for the manner that it had handled Orion's application [not awarding it a permanent grant after the Bechtel decision]. Senator Helms then anointed Orion as the rightful licensee for the Biltmore Forest frequency. After Mr. Kennard's recusal from the Biltmore Forest adjudicative proceeding, Senator Helms stated that Mr. Kennard had given his "voluntary assurances that he will work with us" on the Orion case [obtain a grant for Orion through a rulemaking implementing comparative hearings with criteria which is favorable to it based on the existing record]. See, Congressional Record, p. S11309.

According to Senator Helms, Orion is the most qualified applicant in the Biltmore Forest proceeding because it had successfully operated an AM station in nearby Asheville; the FCC had "curiously disqualified" Orion as an applicant for the Biltmore Forest frequency; and that he and Mr. Kennard want to "rectify this awkward and unjustifiable" situation. Senator Helms also stated that Mr. Kennard "clearly feels that the FCC can conduct hearings on this small group and class of applicants [Orion] using new comparative criteria," rather than using auctions. See, Congressional Record, pp. S11308-11309.

Mr. Kennard stated in response to questions from Senator Helms that the Bechtel decision [which reversed Orion's grant] has caused "unfairness to many applicants" and that he is "quite sympathetic to their predicament." He believes that the FCC should consider arguments that "particular classes of pending applicants [Orion]

should be treated differently." See, Responses of Mr. Kennard to Senator Helms, October 6, 1997, pp. 1-2.

Political interference, or coercion, by a member of Congress cannot be "shrugged off" merely because the nominee agency official should be able to discount what is said by the member of Congress and to disregard the force of the [political] intrusion into the decisionmaking process. Pillsbury Co. v. FTC, 354 F.2d at 964.

Senator Helms' coerced "closing of Chairman Kennard's mind" to favor using comparative hearings, instead of an auction, in the Biltmore Forest adjudicative proceeding as a means to benefit or cause the grant of Orion's application, is demonstrated by the fact that he and the FCC previously considered the adoption of "new" comparative hearing criteria and concluded that no such criteria could be adopted consistent with the requirements of Bechtel. See, Responses of Mr. Kennard to Senator Helms, October 6, 1997, p. 2.

Accordingly, the fact of Senator Helms' hold on the nomination of Mr. Kennard to be Chairman to demand the use of comparative hearings, rather than an auction, and the adoption of "new" comparative criteria to benefit or cause the grant of Orion's application, requires that Chairman Kennard recuse himself from this aspect of the rulemaking. American Public Gas v. FPC, 567 F.2d at 1067-1069; Pillsbury v. FTC, 354 F.2d at 964, Congressional interference with the decisionmaking in an agency rulemaking requires the disqualification of the affected Commissioner.^{1/}

^{1/} Parties are entitled to an impartial tribunal, regardless of whether it consists of one person or five, because there is no way of knowing whether the influence of one upon the others can be quantitatively measured. See, Cinderella Career and Finishing Schools, Inc. v. FTC, 425 F.2d 583, 592 (D.C. Cir. 1970).